

ORIGINAL

EX PARTE OR LATE FILED

BELLSOUTH

BellSouth
Suite 900
1133-21st Street, N.W.
Washington, D.C. 20036-3351

kathleen.levitz@bellsouth.com

Kathleen B. Levitz
Vice President-Federal Regulatory

202 463-4113
Fax 202 463-4198

January 27, 2000

ORIGINAL

WRITTEN EX PARTE

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
The Portals
445 Twelfth Street S.W.
Washington, DC 20554

Re: CIX and ITAA Request for Extension of Sunset Date of the Structural, Non-Discrimination, and Other Behavioral Safeguards Governing Bell Operating Company Provision of In-Region, InterLATA Information Services (CC Docket No. 96-149)

Dear Ms. Salas:

On January 19, 2000, Mary Jean Dennis, Cynthia Ford, and I, all representing BellSouth, met with Ann Stevens, Staci Pies, and Michael Jacobs of the Common Carrier Bureau's Policy and Program Planning Division. The purpose of the meeting was to discuss BellSouth's opposition to a petition filed by the Commercial Internet eXchange (CIX) and the Information Technology Association of America (ITAA). During the meeting, we discussed multiple nonstructural safeguards that will still be in place to protect competition in the interLATA information services marketplace, after the separate affiliate requirement of Section 272(f)(2) sunsets. During that meeting the staff asked us if we could through a subsequent ex parte filing offer a more detailed description of those safeguards. Attached is a matrix that accomplishes that objective. We are also including in this submission a matrix of citations from past Commission decisions in which the Commission expressly recognized the benefits of nonstructural safeguards and their adequacy to protect against anticompetitive behavior.

As required by Section 1.1206(b)(1) of the Commission's rules, I am filing two copies of this notice and ask that you place this notification in the record of the proceeding identified above. Thank you.

Sincerely,


Kathleen B. Levitz

Attachments

cc: Robert Atkinson
Jared Carlson
Ann Stevens
Staci Pies
Michael Jacobs

No. of Copies rec'd 071
List A B C D E

NON-STRUCTURAL SAFEGUARDS WILL CONTINUE TO GOVERN BOC PROVISION OF INTERLATA INFORMATION SERVICES EVEN AFTER THE SECTION 272(f)(2) SEPARATE AFFILIATE REQUIREMENT CEASES TO APPLY

Network Disclosure	<ul style="list-style-type: none"> ◆ Section 251(c)(5) - The duty to provide reasonable public notice of changes in the information necessary for the transmission and routing of services using that local exchange carrier's facilities or networks, as well as of any other changes that would affect the interoperability of those facilities and networks. ◆ Commission promulgated rules implementing section 251(c)(5) network disclosure requirements in the Local Competition Second Report and Order.¹ Network disclosure rules adopted pursuant to section 251(c)(5) supersede the Computer III disclosure rules.² ◆ Part 51.325-51.335 of Title 47 of the Code of Federal Regulations regarding network disclosure requirements will continue to apply.
Customer Proprietary Network Information	<ul style="list-style-type: none"> ◆ All telecommunications carriers are subject to section 222 of the Act. The requirements of section 222 have been effective since enactment of the Act and will continue to govern BOCs' use of CPNI after the section 272(f) (2) separate affiliate requirements cease to apply.
Nondiscrimination Requirements	<ul style="list-style-type: none"> ◆ Computer III nondiscrimination requirements governing BOC installation and maintenance of local exchange and exchange access facilities will remain in effect after the separate affiliate requirement of section 272(f)(2) ceases to apply. ◆ The equal access and nondiscriminatory interconnection requirements of section 251(g) of the Act will also continue to be in effect after the separate affiliate requirement of section 272(f)(2) ceases to apply. ◆ Sections 201 and 202 of the Communications Act requirements will remain in effect.³

¹ Paragraphs 165-260 of the Second Report and Order and Memorandum Opinion and Order released 08/08/96 in CC Docket No. 96-98, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996.

² Paragraph 44 of Report and Order released March 10, 1999 in CC Docket Nos. 95-20 and 98-10 regarding Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services and 1998 Biennial Review – Review of Computer III and ONA Safeguards and Requirements

³ Non Accounting Safeguards Order in CC Docket 96-149 and Paragraph 51 of the Report and Order adopted in CC Docket Nos. 95-20 and 98-10: "...we emphasize that the Communications Act imposes certain nondiscrimination requirements on all common carriers providing interstate communications services. Among them, section 201 provides that all common carriers have a duty "to establish physical connections with other carriers," and to furnish telecommunications services "upon reasonable request therefor."

NON-STRUCTURAL SAFEGUARDS WILL CONTINUE TO GOVERN BOC PROVISION OF INTERLATA INFORMATION SERVICES EVEN AFTER THE SECTION 272(f)(2) SEPARATE AFFILIATE REQUIREMENT CEASES TO APPLY

Cost Allocation Requirements	<ul style="list-style-type: none"> ◆ Part 32 and Part 64 Accounting requirements will continue to apply to BOC provision of intraLATA information services and will also govern BOC provision of interLATA information services. ◆ To the extent a BOC acquires an interLATA transport facility from its 272 affiliate, such transactions will be subject to section 272 disclosure and transactional requirements (i.e., reduced to writing and available for public inspection).
Open Network Architecture (ONA) and Comparably Efficient Interconnection (CEI) Requirements	<ul style="list-style-type: none"> ◆ BOCs will continue to be governed by ONA and CEI requirements for provision of intraLATA information services, after the section 272(f)(2) separate affiliate requirement ceases to apply. Network capabilities used by the BOCs in their provision of intraLATA information services will continue to be available to unaffiliated ISPs pursuant to tariff, on a nondiscriminatory basis. ◆ BOCs have three options for obtaining the interLATA transport facilities needed to provide an interLATA information service: <ul style="list-style-type: none"> – Just as any other unaffiliated ISP, the BOC ISP would be able to purchase an interLATA transport facility from an unaffiliated third party provider (e.g., IXC or GSP). – Obtain facility from its authorized separate 272 affiliate, subject to 272 transactional and nondiscrimination requirements.⁴ ONA/CEI rules, which apply to BOCs, would not apply to interLATA transport facilities used to provide an interLATA information service.⁵ – Use of internal facilities for incidental interLATA transport would be subject to Part 64 and Part 32 Accounting safeguards.

⁴ To the extent a BOC acquires an interLATA transport facility from its 272 affiliate, such transaction will be reduced to writing and available for public inspection.

⁵ A BOC may not directly provide in-region interLATA services until the separate affiliate requirement is removed. Paragraph 57 of the Non-Accounting Safeguards Order released 12/24/96 in CC Docket No. 96-149 states "...a BOC would be required to obtain section 271 authorization prior to providing, in-region, the interLATA telecommunications transmission component of an interLATA information service."

CITES AND QUOTES FROM FCC ORDERS

<p>Paragraph 271 – <u>Non-Accounting Safeguards Order</u> in CC Docket No. 96-149 Released 12/24/96</p>	<p>"A number of safeguards will be available to prevent discriminatory behavior by BOCs after the separate affiliate requirements of section 272 cease to apply. As we explain in detail above, section 251(c)(5), section 251(g), and the Commission's rules imposing network disclosure and equal access requirements oblige BOCs to provide exchange access on a nondiscriminatory basis. In addition, intraLATA services and facilities must be provided on a nondiscriminatory basis under section 251(c)(3), and the provision of interLATA services and facilities will continue to be governed by the nondiscrimination provisions of section 201 and 202 of the Act."</p>
<p>Paragraph 97, <u>Non-Accounting Safeguards Order</u> released 12/24/96 in CC Docket No. 96-149</p>	<p>"Under our rules, the BOCs are subject to existing nonstructural safeguards in their provision of incidental interLATA services, and we conclude that these safeguards are sufficient to protect telephone exchange ratepayers and competition in telecommunications markets in accordance with section 271(h). For accounting purposes, incidental interLATA services will be treated as non-regulated services under our Part 32 affiliate transaction rules and Part 64 cost allocation rules, and accordingly costs associated with provision of those services may not be allocated to regulated services accounts. Further, at the federal level and in many states, the BOCs are subject to price cap regulation, which reduces their incentive to engage in strategic cost-shifting behavior."</p>
<p>Paragraph 98, <u>Non-Accounting Safeguards Order</u> released 12/24/96 in CC Docket No. 96-149</p>	<p>"We agree with BellSouth that it would be inconsistent with the 1996 Act for us to require BOCs to unbundle and make available interLATA transmission services that they are not authorized to provide except as components of an incidental interLATA service (i.e., without obtaining prior authorization under section 271 or complying with the section 272 separation requirements). For the foregoing reasons, we decline to adopt any additional structural or nonstructural safeguards applicable specifically to BOC provision of incidental interLATA services."</p>
<p>Paragraph 7 – Report and Order released 03/10/99 in CC Docket Nos. 95-20 and 98-10</p>	<p>"In Computer III, after reexamining the telecommunications marketplace and effects of structural separation during six years since Computer II, the Commission determined that the costs of structural separation outweighed the benefits, and that nonstructural safeguards could protect competitive ESPs from improper cost allocation and discrimination by the BOCs while avoiding the inefficiencies associated with structural separation."</p>

CITES AND QUOTES FROM FCC ORDERS

<p>10/31/95 Order – Bell Operating Companies Joint Petition for Waiver of Computer II Rules</p>	<p>Paragraph 22 – “Thus, we reaffirm our earlier conclusion that <u>California III</u> returned the regulation of enhanced services not to a <u>Computer II</u> structural separation regime, but rather to a <u>Computer III</u> service specific CEI plan regime, whereby BOCs may provide specific enhanced services on an integrated basis, pursuant to approved CEI plans.”</p> <p>Paragraph 29 – “...we concluded in the <u>Interim Waiver Order</u> that BOC provision of integrated enhanced services provides significant public interest benefits that outweigh the potential harm to competitors and ratepayers from continuing integrated provision of such services on an interim basis.”</p>
<p><u>Interim Waiver Order</u> – 01/11/95</p>	<p>Paragraph 10 – “In <u>California III</u>, the Ninth Circuit upheld much of the <u>BOC Safeguards Order</u>. The court upheld the Commission’s findings that a regime of nonstructural safeguards adequately prevented improper cross subsidization of enhanced services by the BOCs.”</p> <p>Paragraph 10 – “Moreover, the court noted that <u>California I</u> had determined that the Commission had justified, in <u>Computer III</u>, the use of nonstructural safeguards such as ONA to prevent the BOCs from providing ESPs with inferior access to basic network services. The court acknowledged that as an interim measure until ONA was implemented, CEI plans “ensured that enhanced services competitors were provided with interconnections with the BOCs’ own networks that were substantially equivalent to the interconnections that the BOCs provided for their own enhanced services.”</p> <p>Paragraph 19 – “The <u>California III</u> court did not hold that the safeguards elaborated in the <u>BOC Safeguards Order</u> were inadequate; rather, it stated that the Commission had never explained its rationale for lifting structural separation requirements completely, after the “dilution” of the original vision for ONA.”</p> <p>Paragraph 20 – “The court did not find fault with the <u>Computer III</u> CEI service-specific plan regime. In fact, the court acknowledged that the CEI plans ensured that competitors received substantially equivalent interconnection. Thus we disagree with parties who argue that the effect of <u>California III</u> is to reinstate <u>Computer II</u> rules that had previously governed the BOCs’ enhanced services offerings. Instead we conclude that the partial vacation of the <u>BOC Safeguards Order</u> generally reinstates the <u>Computer III</u> service-by-service CEI plan regime, augmented by the implementation of ONA under BOC ONA plans.”</p>

CITES AND QUOTES FROM FCC ORDERS

<p>Report and Order released 12/20/91 in CC Docket No. 90-623</p>	<p>Paragraph 1 - "In this Report and Order, we reverse our determination in <u>Computer II</u> and the <u>BOC Separation Order</u> to impose structural separation requirements for the provision of enhanced services by the Bell Operating Companies (BOCs). In place of structural separation, we adopt effective regulatory safeguards that will permit the BOCs to provide enhanced services to the public in ways that will best further the public interest and serve American consumers. "</p> <p>Paragraph 6 – "A regulatory framework that permits the BOCs to provide enhanced services pursuant to safeguards that will both effectively protect against cross-subsidization and discrimination and encourage efficient use of BOC resources to provide enhanced services will best serve the public interest."</p> <p>Paragraph 7 – "Our experience over the last ten years demonstrates that removal of structural separation requirements has resulted and will result in greater BOC participation in the provision of enhanced services."</p> <p>Paragraph 9 – "...we have adopted and implemented a comprehensive regulatory framework that provides an effective alternative to structural separation for protection against anticompetitive conduct."</p>
<p>Memorandum Opinion and Order on Reconsideration in CC Docket No. 85-229 released 05/22/87</p>	<p>Paragraph 27 – "We also found that the benefits of structural separation for the BOCs are not significantly greater than those of nonstructural safeguards in preventing anticompetitive activities."</p>
<p><u>Computer III Order</u> released 06/16/86 in CC Docket No. 85-229</p>	<p>Paragraph 3 – "We conclude that, relative to nonstructural safeguards, the structural separation requirements impose significant costs on the public in decreased efficiency and innovation that substantially outweigh their benefits in limiting the ability of AT&T and the BOCs to make unfair use of their regulated operations for the benefit of their unregulated, enhanced service activities."</p>
<p>Paragraph 199, Report and Order Released 09/20/96 in CC Docket No. 96-128¹</p>	<p>"In addition to the accounting safeguards that we will adopt with respect to payphone services in the accounting safeguards proceeding, we conclude that the <u>Computer III</u> and <u>ONA</u> nonstructural safeguards will provide an appropriate regulatory framework to ensure that BOCs do not discriminate or cross subsidize in their provision of payphone service. The Commission and the BOCs have substantial experience in the application of these safeguards that will facilitate their use in the context of BOC payphone services. We conclude that we do not have to adopt any additional safeguards beyond <u>Computer III</u> and <u>ONA</u> because of the comprehensive nature of that regulatory structure and the lack of a record necessary to conclude that a more burdensome framework should be adopted and is in the public interest."</p>

¹ Reflects the effectiveness of nonstructural safeguards in a non-information services context.